The Mises Review

VOLUME 7 NUMBER 4 WINTER 2001

Can the State Justly Kill Innocents?

"War and Murder" and "Mr. Truman's Degree," in *Ethics, Religion, and Politics*

G.E.M. Anscombe
University of Minnesota Press, 1981
Pp. 51–71

The events of September 11, and the response to them by the Bush administration, make Elizabeth Anscombe's classic essays newly pertinent. Her essays present the most influential account by an analytic philosopher of the just war tradition. Several of the points she raises help us to evaluate the president's policy of force.

Anscombe rejects pacifism, but the occasions that justify resort by the state to external violence are few. "The same authority which puts down internal dissension . . . must equally oppose external enemies.

Rawls's Ballet
John Rawls
Justice as Fairness: A Restatement 4

A Substitute for Knowing
Robert Nozick
Invariances: The Structure of the Objective World 9

One Flew Over Equality
Antony G.N. Flew
Equality in Liberty and Justice 14

Inadvertent Ammunition
George P. Fletcher
Our Secret Constitution: How Lincoln Redefined American Democracy 19

The Student and his Professor
Israel Kirzner
Ludwig von Mises: The Man and His Economics 23

A Quarterly Review of Books, by David Gordon

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These do not merely comprise those who attack the borders of the people ruled by the authority; but also, for example, pirates and desert bandits, and, generally, those beyond the confines of the country ruled whose activities are viciously harmful to it" (p. 52). Later, she allows armed force "to put frightful injustices right" (p. 68). Absent one of these circumstances, war is forbidden.

Anscombe's criteria challenge the current policy of the United States. As the official account has it, the attacks against the World Trade Center and the Pentagon have behind them a terrorist organization headed by Osama bin Laden. Various commentators have disputed the accuracy of this account; but if it is right, action against this group clearly passes Anscombe's test. The major difficulty for the Bush administration lies elsewhere. (Once more, I assume for the purpose of argument the veracity of the "official" story.)

The United States demanded that the Taliban regime of Afghanistan hand over to it Osama and his chief lieutenants and destroy the camps of his organization. When the Taliban refused this ultimatum, the United States commenced a massive policy of bombing, designed to topple it from power. By Anscombe's standards, how can a direct attack on Taliban forces be justified? Did the Taliban join with Osama in plotting an assault on the United States?

Rather, it is alleged that the Taliban stands guilty of complicity because it allows Osama to reside in Afghanistan and will not surrender him. In doing so, is it engaged in conduct "viciously harmful" to the United States? Unless it is, just war theory condemns the administration's policy. It is important here to bear in mind the exact question at issue. The United States does not merely claim that it may use force against Osama and his band in Afghani territory. It also claims that it may destroy the armed forces of the governing regime there.

Suppose one accepts the rationale behind the president's policy. Has the conduct of the war been just? At first glance, it appears so. Has not the United States aimed exclusively at military targets? A number of civilians have been killed, but are they not "collateral damage"? "[I]f you attack a lot of military targets, such as munitions factories and naval dockyards, as carefully as you can, you will be certain to kill a number of innocent people; but that is not murder" (p. 66). The famous doctrine of double effect underlies Anscombe's judgment. So long as the bombers do not bring about the death

The MISES REVIEW

PUBLISHED BY THE LUDWIG VON MISES INSTITUTE

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of civilians as a direct means to their goals, no murder has occurred. The death of the innocents is a foreseen consequence, not the intended aim.

Supporters of the "collateral damage" view are not yet home free. Anscombe is careful to note that the appeal to indirect effect can be pressed too far. "It may be impossible to take the thing (or people) you want to destroy as your target; it may be possible to attack it only by taking as the object of your attack what includes large numbers of innocent people. Then you cannot very well say they died by accident. Here your action is murder" (p. 66). Whether the United States has crossed the line must be for readers to judge.

Anscombe also suggests another point that can be applied to the current crisis. Unless we adopt a resolute response to terrorism, it is often suggested, do we not render ourselves constantly at risk? This question rests on an unstated premise.

The question takes for granted that the United States should maintain its global commitments: lacking these, would it be necessary to "respond" to quite so many terrorist threats? Of course, one can reply that the terrorist danger would menace an isolationist America no less than it does today, but is this not implausible?

Anscombe brings out in a masterful way the fallacy of assuming the status quo. In response to the claim that using atomic weapons against Japan saved lives, because otherwise a massive invasion would have ensued, she is forthright: "I do not dispute it. Given the conditions, that [an invasion costly in lives] was probably averted by that action. But what were the conditions? The unlimited objective" (p. 65). Given certain conditions, drastic measures appear needed; but should this very fact not make us take a close look

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at the supposed necessities of the present state of things? If we do not, but instead insist that extreme circumstances demand extreme responses, we are in danger of adopting the maxim that "every fool can be as much of a knave as suits him" (p. 65). ✦

RAWLS'S BALLET

Justice As Fairness: A Restatement

JOHN RAWLS
HARVARD UNIVERSITY PRESS, 2001
XVIII + 214 PGS.

Time has not been altogether kind to John Rawls. True enough, his *A Theory of Justice* has been the most widely acclaimed book in political philosophy since its publication thirty years ago. But Antony Flew, Robert Nozick, and other critics have devastated Rawls's *Das Kapital* of the welfare state, in particular his famous difference principle. Rawls has met these objections, for the most part, by constant reiteration of his original contentions.

In one respect, though, he has changed course. Beginning with *Political Liberalism* (1993), Rawls began to claim that his theory was devised to fit a special set of circumstances, and he continues this emphasis in the book we have now to consider.[1] By limiting his theory's application, Rawls hopes to strengthen support for it; and his new starting point, one must admit, is plausible.

Is it not the case that, in a constitutional democracy like the United States, large numbers of people find themselves at odds on key issues? Some people, for example, support laissez-faire capitalism; others foolishly support socialist nostrums. (Of course, Rawls would not put it quite like that.) Should society allow abortion? What role, if any, should government play in education?

In a constitutional democracy like the United States, large numbers of people find themselves at odds on key issues.

These political disputes, and others like them, do not arise from nothing. As Rawls rightly notes, people hold various "comprehensive moral doctrines" from which their opinion on particular issues follow: "The elements of such a conception [of the good] are

[1] *A Theory of Justice* contains signs of the current strategy, but it is not emphasized.

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normally set within, and interpreted by, certain comprehensive religious, philosophical, or moral doctrines in the light of which the various ends and aims are ordered and understood" (p. 19).

Rawls's starting point cannot be gainsaid; people in societies like the United States do indeed differ fundamentally on basic issues. Unless everyone by some miracle converts to the same doctrine—of course the true doctrine that we now hold—must we not learn to live with inevitable conflict? Rawls does not think so.

Unless everyone converts to the same doctrine, must we not learn to live with inevitable conflict?

Instead, everyone must, for the purposes of public discussion, abandon his own comprehensive doctrine. In its place, "public reason" becomes the order of the day. Since you know that others do not share your most fundamental beliefs, is it not obvious that you cannot rely essentially on them in debates on the basic structure of society? Others must accept a parallel restriction on using their own comprehensive doctrines. By doing so, those with irreconcilable doctrines can live together peacefully.

But what is left? If none of us can appeal to our own convictions, is not discourse emptied of all content? Must not public discussion under Rawls's restriction be reduced to what F.H. Bradley called "an unearthly ballet of bloodless categories"? Rawls finds a way out.

A substitute set of reasons enables us all to proceed. Each person adopts for public discussion reasons that depend on no comprehensive doctrine. Instead, these reasons assume only that each person is a free and equal member of society. Contrary to what one might at first think, to put aside one's most deeply held views does not condemn discussion to sterility.

A new difficulty seems immediately to arise. Will not a problem analogous to the one Rawls has endeavored to solve now confront us? Will not people who restrict themselves only to public reason find themselves mired in new disagreements? Why will those who recognize each other as free and equal find their debates free of discord?

Our author responds with a simple solution. Everyone adopts the same set of reasons. Well, you may say, Rawls has secured the unity he so much wants: but has he not paid too high a price? Why will people give up their comprehensive doctrines—the positions that are to them most basic—just to secure agreement with others?

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Here exactly our author is at his most ingenious. Rawls, it develops, is not so unrealistic as to expect people to abandon their most basic beliefs. Quite the contrary, everyone in the Rawlsian world retains his beliefs, even though these cannot be used in public discussion on society's basic structure.[2] But if the beliefs cannot be used in so essential a context, in what sense do they remain?

Rawls's answer takes us to the heart of his new approach. Each person will ask, from within his own comprehensive doctrine, what he is to do when others in society radically disagree. Those who do so will find resources in their own fundamental beliefs to support public reason. Each system, that is to say, will perform an act of self-abnegation: it will deduce from its own tenets that its distinctive doctrines must be placed to one side, when diverse positions show themselves present. In brief, an "overlapping consensus" of various comprehensive doctrines supports public reason.

One point more, and we will grasp the essence of what Rawls has in mind. Public reason, as he conceives it, does not consist of innocuous generalities, so bland that all comprehensive views can accept them. In his opinion, resort to public reason generates universal agreement on the proper basic structure of society. By an odd coincidence, this structure is identical with the scheme that Rawls propounds in *A Theory of Justice*. In particular, public reason endorses the radically egalitarian "difference principle."

Rawls's new construction strikes me as wrong in all its major contentions, except for his starting point. Certainly he is right that people in modern societies do not unite in accepting a comprehensive doctrine. But he at once takes a false step. He assumes that, unless its situation is somewhat palliated, a society whose members have clashing beliefs faces disaster. But why assume this? Why cannot people with differing beliefs live together, even if each person refuses in public debate to dilute his own beliefs? Why, for example, should a natural-rights libertarian put aside his views just because he knows that egalitarians in his society do not share his beliefs? Why should he not attempt to defend his beliefs as best he can?

Why cannot people with differing beliefs live together, even if each person refuses in public debate to dilute his own beliefs?

Our author responds that to do so is to render society unstable. Stability

[2]Once the basic structure of society is set, people can use their comprehensive doctrines to a limited extent in public debate. If, for example, their support for a measure derives from such a doctrine, they must also be able to appeal to public reason in its defense.

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demands more than a mere *modus vivendi*; unless people adopt public reason, society stands at risk of dissolution. People who operate exclusively within their comprehensive doctrine will be tempted to impose their views on others, should the occasion arise. Only when people through the use of public reason become attached to the proper basic structure can a society resist disintegration.

How does Rawls know all this? He has engaged, without evidence, in sociological conjecture. Why cannot a society exist for a long period without the sort of stability that Rawls wants? He does not tell us. Perhaps, though, I have misread him, and his enterprise is one of definition. He is not prepared to call a society "stable" unless it acknowledges public reason. If he has this in mind, why should anyone else be concerned with stability in his sense?

What seems to underlie Rawls's concern about stability is this. During the wars of religion in early modern Europe, nations sought to impose a single religion on their recalcitrant subjects. The attempt to do so led to disastrous conflicts: does this not show the dangers of attempts to impose a comprehensive moral doctrine? How can so unfortunate an outcome be prevented except by universal adoption of public reason?

Rawls might thus reply to my charge that he speculates without evidence with a direct denial. His invocation of public reason rests on the lessons of history. But in fact this response depends on appeal to a biased sample. Of course an attempt to impose religion is liable to meet resistance from those who profess another faith. Not all comprehensive views, though, teach that their doctrine should be imposed by force. If a comprehensive doctrine does not call for dissenters to be suppressed, why need its use in public debate lead to irreparable social conflict? Must a society that contains people who differ on the need for a welfare state collapse unless people confine their public arguments to a set of common reasons?

Even if Rawls's argument from stability fails, he can still rescue his theory. According to his account, all comprehensive doctrines—at least those among them fit for polite society—imply that public reason governs society in case people differ in doctrine. Rawls holds then that all acceptable theories lead to his theory. He does not need the appeal to stability: the comprehensive doctrines themselves directly imply his view.

Unfortunately for him, his daring contention fails. No doubt it would be convenient for him if all the most important comprehensive views

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The gains from social cooperation do not belong to society, and there is nothing to "distribute."

favored public reason in case of conflict. But he never shows that even one such position has this consequence. Will, for example, a utilitarian be apt to resort to Rawls should he find that others fail to share his views? Will he not rather endeavor to apply his utilitarian convictions to the circumstances? And will not a supporter of natural law attempt to apply his position? Rawls's claim is utterly arbitrary.

But let us put all this aside and grant Rawls his premise. Suppose that everyone agrees to confine public argument to the restricted premise of public reason. Will the result be, as Rawls claims, that his own theory of justice will be instituted? He secures this result only through unjust tactics. He considers at some length various principles a society might adopt to distribute the gains from social cooperation. In particular, he contends that his difference principle defeats the competing rule of maximizing average expected utility.

He secures victory for his system only by dismissing out of hand all major competing views. As natural-rights libertarians see matters, property rights render otiose Rawls's question. The gains from social cooperation do not belong to society, and there is nothing to "distribute." The rights to liberty and property that people possess independent of social decision settle all questions of ownership. Our author is of course quick to wave aside this alternative; it subordinates equality to arbitrary moral luck. But this reply convinces only if one begins from Rawls's strongly egalitarian starting point. If one declines to do so, Rawls makes no case that public reason requires his difference principle. It would not matter much if it did, since he has concocted public reason out of nothing. Further, the difference principle still would fall before the objections of Flew and Nozick.[3] The alleged fact that public reason supports a principle avails nothing, if that principle is unsound. ✦

[3] I discuss some of these in my review of Flew's *Equality in Liberty and Justice*, elsewhere in this issue.

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A Substitute for Knowing

Invariances: The Structure of the Objective World

Robert Nozick
Harvard University Press, 2001
x + 416 pgs.

Readers of this journal will probably be most interested in Nozick's views on ethics, especially as they relate to libertarianism, and it is on these that I propose to concentrate. In doing so, I run the risk of distortion. *Invariances* is full of new ideas, and no review that stresses a small part of the book can do it justice.

Nozick's remarks on libertarianism, though brief, are full of interest. He distinguishes several layers of ethics: "The first layer is the ethics of respect, which corresponds to an (extended) ethics mandating cooperation to mutual benefit. Here there are rules and principles mandating respecting another (adult) person's life and autonomy, forbidding murder and enslavement, restricting interference with a person's domain of choice, and issuing in a set of (what have been termed negative) rights" (p. 280, emphasis removed). Other layers, such as the ethics of caring, go beyond the duty of noninterference with others and call for positive aid to them.

Given these various levels, the question at once arises: which of them, if any, may be enforced by coercion? In his response, Nozick weighs in as a libertarian: "The ethics of respect . . . is the part, the one part (I think) that is (that should be) mandatory across all societies. . . . [S]ome particular society may attempt to make one or another of these further levels mandatory within it . . . I also believe . . . that no society should take this further step. All that any society should (coercively) demand is adherence to the ethics of respect" (pp. 281–82).

Can one defend libertarianism adequately on this basis? At first sight, one might think so: has Nozick not stated succinctly and accurately the essence of a free-market order? But his profession of belief raises a problem. What is the status of his contention that coercion should not pass beyond the ethics of respect? Can it itself be coercively enforced, or does it merely reflect a "personal ideal" that Nozick holds? Where does this principle fit within the doctrine of moral levels?

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Unless Nozick holds that the principle limiting coercion to the morality of respect itself forms part of the morality of respect, he has failed to reach an adequate libertarian standpoint. To tell us that he himself prefers that society limit enforcement in this way has no more than biographical interest: the question is whether morality demands it.

There is, I think, a more fundamental problem with Nozick's view of morality.

There is, I think, a more fundamental problem with Nozick's view of morality. He questions whether ethical truths exist at all. "How can ethical statements be true, if truth consists in correspondence to the facts? Are there special kinds of facts, ethical ones, and if so, by what route do we discover them? . . . The history of philosophy is abundant with unsuccessful attempts to establish a firm basis for ethical truths. Inductively, we infer that the task is unpromising" (p. 236).

But do not our considered moral judgments put us in touch with real values "out there" in the world? Nozick finds no basis in evolutionary theory to account for this claimed grasp of values. He then endeavors, with great ingenuity, to piece together an ersatz objectivity that makes no dubious claims about real values.

But why is Nozick's project necessary? Suppose he is right that we cannot explain by use of Darwinian evolution how we can grasp ethical truth. Why should we take this as a decisive reason to abandon the claim that we know such truths? Perhaps we have instead grounds to doubt that Darwinian processes account for all our knowledge.

We might press the point further. It is hard to explain through evolution how we know necessary truths. Does this give us reason to abandon necessary truth? If not, why should we toss moral truths overboard on Darwinian grounds?

Nozick of course fully anticipates this response. Indeed, it is virtually impossible to think of a point that this most brilliant and imaginative of contemporary philosophers has not already considered. But his answer I find astonishing. He does propose to abandon necessity, in large part because he cannot account by evolution for how we might attain such knowledge. Why he accords evolutionary considerations such enormous weight escapes me.

But my skepticism is not an argument, and Nozick's intricately elaborated alternative to ethical truth merits attention. Once again, Darwinian

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evolution exerts decisive weight. Nozick endeavors to determine the evolutionary function of ethics. Why has natural selection endowed us with the capacity to make moral judgments? He plausibly suggests that cooperative behavior in some circumstances increases that be-all and end-all of those enamored of evolutionary theory, "inclusive fitness."

Suppose Nozick is right. Why does this matter for ethics? As always, our author has considered the objection: "Derek Parfit . . . asks the pertinent question of what difference is made by something's being the function of ethics. Many things have bad functions (war, slavery, etc.). And even when the function is a good one, as evaluated by the standards instilled to go with cooperation, is normative force added by saying that this good effect of ethical principles (namely, enhancing mutual cooperation) also is the function of ethics?" (p. 390, n. 15).

Nozick's response brings out a key feature of the book. Ethical rules not only have a function but also exhibit certain properties that enable them to carry out this function effectively. One of these has to our author decisive importance. "Objective ethical truths . . . are held to involve a certain symmetry or invariance. . . . The Golden Rule mandates doing unto others as you would have others do unto you" (p. 289). As Nozick sees matters, invariance under transformation is the mark of truth. Once we combine function with invariance, in a vastly more complicated way than I can here explain, we arrive at objective truth—or at least a close substitute for it.

Surely Nozick is right that cooperative behavior of various sorts might have benefited our ancestors. On evolutionary grounds, though, would not a tightly knit group able to prey on others also have enjoyed a selective advantage? So, at any rate, Sir Arthur Keith long ago maintained in *A New Theory of Human Evolution*. Why do not rules that mandate aggression against strangers also qualify as part of an objective ethics? Nozick might counter with the claim that such rules do not admit of generalization in the way that he holds is required for objectivity. But this remains to be shown. Generalization need not bring us to "love to all people, perhaps all living creatures," much less to "being a vessel and vehicle of Light," the two highest levels of Nozick's ethics (p. 280); it can equally well eventuate in a far more Nietzschean outcome. It all depends where one starts.

As Nozick sees matters, invariance under transformation is the mark of truth.

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Faced with Nozick's convoluted analysis, which he himself worries has too many epicycles, one wants to say: can't he just see that values are really present in the world? Why need one abandon what is self-evident in favor of a speculative and endlessly imbricated substitute for genuinely objective values?

Why need one abandon what is self-evident in favor of a speculative and endlessly imbricated substitute?

Here we reach bedrock. Fundamental to *Invariances* is Nozick's distrust of claims of direct knowledge of the nonempirical. We do not "just know" that people have rights, anymore than we directly see that both sides of a contradiction cannot at the same time be true. Once again, evolution forbids it. "Such debates [about necessary truth] would be avoided if we possessed a faculty of reason that could directly assess the possibility of general statements and of their denials. . . . However, we do not appear to have such a faculty, and it is implausible that evolutionary processes would instill that within us" (p. 122).

But does this not create a problem for Nozick's libertarianism? He famously began *Anarchy, State, and Utopia* by telling us, "Individuals have rights." Are not such absolute claims ruled by Nozick's newly installed divinity, Evolution? He can at most say that an evolutionary fable makes somewhat plausible that one can hold, as a personal ideal, that people cannot be coerced beyond what the level of respect mandates. This hardly seems worth writing home about.

Nozick's rejoinder is obvious. No doubt it would be convenient for libertarians if we could claim our doctrine to be true a priori; but fairness to the facts requires that we abandon this claim. And to support his denial that we directly grasp necessary truth, he deploys an intriguing argument. To claim something is necessarily true is to say that it is true in all possible worlds: it cannot be otherwise. Is this not an extraordinary claim to make? To claim, by contrast, that something is possible is a much more modest assertion. "It is easier to think of possibilities than of necessities, easier to know that something is possible than that it is necessary" (p. 121). Do not exponents of necessary knowledge seek mistakenly to limit the imagination? Who are we to say that something must be so?

Many things, no doubt, are easy to imagine; but our ability to think of something hardly shows that it is really possible. If something is possible, then nothing in any possible world renders it impossible. Is this not as radical a claim as the one Nozick would deny to us? Oddly, Nozick elsewhere makes an

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analogous claim: "[A] theory can appear consistent and transparent . . . yet still harbor contradictions. . . . Not everything that looks consistent really is possible" (p. 162). But he does not note the bearing of this on his earlier contention. Nozick's argument leaves claims to necessary truth undamaged, unless he also wishes to throw into question our knowledge of possibility.

Further, why do those who claim direct access to real values have to say that propositions about value are necessary? Why is it not enough to assert that the value propositions are true? Nozick goes to great lengths to imagine "an admittedly extremely gruesome" case in which it is not wrong to torture babies to death for fun (p. 349, n. 35). Even if one seriously entertains his case, does this throw into doubt our knowledge that, in the actual world, such torture is wrong?

Nozick has studied carefully a wide range of difficult subjects, quantum mechanics and string theory not least among them; and I cannot pretend to grasp more than a few regions, on earth or near it, of his vast philosophical cosmos. I shall close with a few points of detail. One of his arguments that the law of noncontradiction may fail to hold depends upon a questionable appeal to a principle of sufficient reason (p. 303, n.1). He seeks to disarm C.I. Lewis's claim "that each relative statement corresponds to an absolute one, viz., the one that makes the relativity explicit" by adducing Einstein's theory of relativity. But the claim that Einstein's invariant statement is "not simply the explicit statement (à la C.I. Lewis) of this relativity" leaves Lewis's assertion intact (p. 319, n. 76). He takes "nothing can be red and green all over at the same time" to be about whether these particular two colors can be combined. The fact that we cannot see reddish green he takes to depend on contingent scientific facts; hence the much-debated statement is not necessary. But the proposition is not about mixed colors at all (pp. 136–38). His statement about wave-packet collapse, "that failure of derivability comes precisely at the point where physical systems that are identical with conscious beings interact with physical systems in a superposition" (p. 230), begs the question against dualism about the mind.

The old master has not lost his power to fascinate. What an extraordinary mind, and what an unusual way of looking at the world!

Though I find myself in strong disagreement with many of the views in *Invariances*, I closed the book with admiration. The old master has not lost his power to fascinate. What an extraordinary mind, and what an unusual way of looking at the world! ✦

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One Flew Over Equality

Equality in Liberty and Justice

Antony Flew
Transaction Publishers, 2001
xx + 224 pgs.

Like Gilbert Ryle, under whom he studied at Oxford, Antony Flew is ever alert to "systematically misleading expressions." Flew's careful attention to the nuances of ordinary language, on full display in the present book, shows to best advantage the virtues of ordinary language philosophy. Flew cites a key passage from J.L. Austin, one of the great exponents of this philosophical movement, which sums up its approach: "Certainly, then, ordinary language is not the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it is the first word" (p. 36, emphasis omitted, quoting Austin).

Abuses of language, Flew amply shows, characterize many anti-free-market arguments. One of the most popular arguments against capitalism, for example, relies crucially on a confusion of two terms. The argument proceeds in this way: The free market may well be more efficient than socialism or interventionism. But some cannot manage in a free economy. They have no services or products that others want: how then can they survive in a regime of complete market freedom? Gross inequalities of this kind cannot be tolerated; to remedy them, the government must correct the market through redistribution of wealth and income.

The line of thought rests on a shift from one word to another. It first speaks of people who, it is alleged, cannot survive in a free-market society. But this sad situation has nothing to do with how the income of these unfortunates compares with that of others. Why then the complaint about inequality? Of course if the government takes from the better off to help the poor, inequality lessens; but helping the poor and leveling income differ entirely as goals.

Abuses of language, Flew amply shows, characterize many anti-free-market arguments.

Flew skillfully identifies the misuse of language: "On the one side—call it the left—we have public policies intended to make the condition of all

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those subject to these policies in some respect (more) equal. On the other side—which may now be the right—are public policies aiming to insure that none shall fall below some minimum level. . . . The objectives of this left are thus essentially and intentionally egalitarian, in a way in which those of this right are not" (p. 184).[1]

An example helps to clarify Flew's point. Suppose that in a community of one hundred people, eighty have annual incomes of at least $1,000,000. The other twenty unfortunates must make do with a mere $100,000. A policy that aimed to limit inequality here would not reduce poverty at all; there is no poverty to eliminate.

Radical egalitarians often use sympathy for the poor to foist their schemes on us. A prime example of such slippery propaganda is the much-vaunted difference principle devised by John Rawls. In a Rawlsian society, all inequalities in wealth and income must be to the advantage of the least well-off class in the society. By speaking of the worst-off class, Rawls conjures up images of destitute people. But in fact Rawls's principle does not cover the truly needy at all. Rawls's principles of justice concern distribution of the gains from social cooperation; those unfortunates who have nothing useful to offer do not come within their scope. Those "worst off" in Rawls's sense are not very bad off at all, a fact that does not deter the eminent Harvard professor from use of this misleading language.

I have mentioned Rawls for ulterior reasons. For me, the highlight of the book is Flew's mordant demolition of Rawls's extravagantly overrated *A Theory of Justice*. For Flew, the assault on Rawls transcends ordinary scholarly controversy. Rawls's lapses from proper standards of philosophical argument, all in the service of egalitarian propaganda, arouse Flew to indignation wonderful to behold. Rawls, he notes in a characteristic passage, "must thus have become the first person ever to produce what purports to be a treatise on justice which can find no room even to quote, much less to discuss, any version of the traditional distinction. By this misguided omission Rawls exposes himself to the objection that

Radical egalitarians often use sympathy for the poor to foist their schemes on us.

[1]A question not addressed in Professor Flew's excellent discussion is whether governmentally mandated minimum level programs violate natural rights.

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what he commends as a conception of justice is not, whatever its other merits, a conception of justice at all" (p. 120).[2]

Flew's objections strike at the heart of Rawls's theory; and I think it likely that his criticisms, along with parallel thrusts from Robert Nozick, have sent Rawls scurrying to buttress his shaky edifice with "public reason."[3] In his defense of the difference principle, Rawls makes a great to-do about principles of rational choice under uncertainty; but the key to his case lies elsewhere. He thinks that people do not deserve to profit from their superior abilities, because these are arbitrary from the moral point of view. If so, Rawls claims, equality is the default position and any departure from it requires justification.

I suspect that Rawls's principle will strike most of my readers as alien; but an example will show what Rawls has in mind. If one says to Rawls, "Michael Jordan makes enormous sums of money, but of course he deserves to do so: People willingly pay him because they value his skills," he will shake his head. "No doubt he is phenomenally skilled," he might reply, "but he acquired his ability through no moral merit of his own. He is simply lucky enough to possess physical skills that exceed those of other players. Why should he benefit so greatly from the mere fact that he has 'good' genes?"

Flew, once more displaying his careful attention to conceptual precision, expertly locates the fallacy in Rawls's contention. Rawls has moved from the contention that the category of desert does not apply to natural endowments to the much more controversial claim that these endowments are undeserved. The latter implies, as the former does not, that people should not benefit from them. As our author puts the point, "The reason why this argument appears to go through is that the word 'undeserved' does indeed usually carry overtones of outrage, calling for redress. What is needed now is to introduce a third category of the not-deserved to cover what is neither, meritoriously, deserved, nor scandalously, undeserved" (p. 150).

Rawls thinks that people do not deserve to profit from their superior abilities, because these are arbitrary from the moral point of view.

[2]Flew draws attention to the outraged protest against "Rawls and his coterie" by R.M. Hare in *Philosophical Quarterly* (1973): 119.

[3]I address these efforts in my review elsewhere in this issue of *Justice As Fairness*.

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Michael Jordan's income is safe. He may be entitled to benefit from his extraordinary talent, even though he did not acquire this talent by doing morally good deeds. And can we not go further? To some extent, he and other gifted people like him do deserve to profit from their abilities. In most cases, they must develop their potential through hard work: do they not then in part gain their benefits from meritorious activities? "Moral luck" does not suffice to account for what they have.

Flew notes the problem in his inimitable way: what we have left in Rawls's system are "blinkered and de-individualized zombies."

Rawls has to this point an incredible rejoinder. He acknowledges that people develop their talents through hard work. But this trait too must be attributed to moral luck: if you have an extraordinary capacity for work, this also is "arbitrary from the moral point of view."

Here Rawls has unintentionally reduced his position to absurdity. No properties of individuals that Rawls considers morally arbitrary entitle persons to wealth or income. But so extensive is his list of these properties that, when they are removed, nothing remains of genuine individuals. Flew notes the problem in his inimitable way: what we have left in Rawls's system are "blinkered and de-individualized zombies" (p. 148). Rawls's theory has no relevance to flesh-and-blood human beings.

As if this were not enough, Flew finds another problem with Rawls's theory. Let us put to one side for a moment all the difficulties Flew has raised for Rawls's notion of desert. Should he, *per impossibile*, be able to overcome them, Rawls would still confront a crucial obstacle. Even if individuals do not own, and deserve to benefit from, their special talents, it hardly follows that society does. Yet this is what Rawls without argument assumes: "It simply will not do . . . to collect up, in thought, all the wealth already produced and in the future to be produced by all the individuals and firms in society; to describe this as the total social product, conceived as the product of an hypostatized super-person, Society; and then take it for granted that this total social product is in fact now available, free of all prior claims, for redistribution among the members of that same hypostatized entity, Society, at its absolute collective discretion" (p. 160). (I have quoted this at some length to convey the flavor of Flew's wonderful rolling sentences.)

But is this not unjust to Rawls? What about his whole elaborate apparatus: the original position, choice behind the veil of ignorance, primary goods, etc.? Have we not dismissed

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without trial the essential elements of Rawls's enterprise?

Not in the slightest. Flew has located a passage from *A Theory of Justice* that is devastating in its revelation of the nature of Rawls's project: "We want to define the original position so that we get the desired solution" (p. 134, quoting Rawls). The difference principle does not stem from an impartial "decision procedure for ethics," as Rawls titled an early paper; quite the contrary, he has ensured egalitarian conclusions by his starting point. Flew ironically observes that given the "endearing frankness" of Rawls's confession, "it should come as no surprise that the curiously deprived creatures" in the original position arrive at egalitarian conclusions (p. 134). Rawls has concealed from them any information that might have induced them to favor conflicting principles.

Though the massive campaign against Rawls occupies our author a good deal in the book, he by no means confines himself exclusively to it. Flew discusses in illuminating fashion many other topics, including the justification for natural rights and the fallacies of Rousseau's political theory. I shall here confine myself to one more topic, in which Flew displays yet again his skill as an ordinary language philosopher.

Do we have free will? Flew responds to this traditional problem with a simple observation. We learn the concept of free action by becoming acquainted with typical situations in which people are said to act freely. Someone chooses freely, for example, if he considers with care various alternatives and, without coercion, picks the one he most prefers. In a fashion that would delight Mises, Flew contends that it makes no sense to ask if someone in this situation "really" enjoys freedom. How can he not be free, if we have learned the concept from cases of this kind and its like?

Once more the temptation to quote Flew should not be resisted: "For if the very ideas both of physical necessity, and of the ability to do other than we do, both are, and can only be, acquired by references to our abundant experiences of the two contrasting kinds of reality to which these ideas refer; then who but the most bigoted of behaviouristic psychologists could continue to insist that, really, even paradigm instances of the latter are covert cases of the former?" (p. 11). This may not be the last word on free will, but it is the first word.[4] ✦

This may not be the last word on free will, but it is the first word.

[4]Whether we have so-called contracausal freedom is not settled by this consideration.

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Inadvertent Ammunition

Our Secret Constitution: How Lincoln Redefined American Democracy

George P. Fletcher
Oxford University Press, 2001
xi + 292 pgs.

Professor Fletcher's book brings to mind a remark by Yvor Winters, in a review of C.S. Lewis's *English Literature in the Sixteenth Century*. Winters praised Lewis for his grasp of the facts, but he said that he disliked whatever writers Lewis liked, and vice versa. Fletcher agrees with M.E. Bradford and other defenders of tradition that Lincoln destroyed the Old Republic, but he is happy about it. Those of us who side with Bradford will find in this very useful volume a familiar picture, but reflected in a distorting mirror.

As Fletcher sees matters, the American Founding Fathers had the wrong idea. Foolishly, the authors of the Constitution thought that the people had the right to choose their government, as if a nation were a club that one may join or leave at will. Even worse, they thought that the states retained sovereign powers. Did they not see that the states needed to be submerged into a new organic union?

Whatever can have been the matter with dolts like these? They believed that the government needed to be strictly limited. What nonsense! We need a strong centralized authority—of course to protest the weak. Fortunately, we were blessed in 1861 with a heroic Leader, Abraham Lincoln, who realized the folly of the old ways. He saw that America had to be remodeled along the lines of the progressive European nations.

Our Leader faced a problem. The Southern states had the gall to believe that America remained bound by the antiquated Constitution; and, exercising their rights under a plausible interpretation of it, they seceded from the union in fear of what the Leader had in store. So great a Leader surely could not accept dissolution of the organic nation. The South would have to be dealt with.

Fletcher agrees with defenders of tradition that Lincoln destroyed the Old Republic, but he is happy about it.

But did not the Constitution bar the Leader's path? Even if antiquated, was it not still legally binding? Yes, in a way; but our Leader rightly did not pay

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much attention to this scrap of paper. Why should he accept the commands of men long dead? He had work to do!

Manifesting his supreme wisdom, our Leader used to his own ends the Southern threat to the organic union. Though our country was "conceived in liberty," a sin stained us. Slavery had always threatened to undercut the nobility of the organic nation; but now a remedy was at hand. Through a war to compel the recalcitrant states to obey the commands of the Leader, we could purge ourselves from sin.

To end slavery peacefully would not have been enough. To cease from sin does not suffice for atonement and redemption. The redemptive suffering that war offered had to be borne, if our nation was to emerge to "a new birth of freedom." Our Leader was equal to the task, and his speeches show that he fully grasped his divine mission.

After the Leader's death, the Reconstruction Amendments promised to carry on his plans for a centralized government that would protect the weak. But a reactionary Supreme Court rudely interrupted these plans, by giving the amendments a narrow construal. The Court, incredibly, thought the old Constitution still binding and spurned the New Order. But all was not lost. The Reconstruction Amendments remained in the nation's conscience. Legal emasculation proved powerless ultimately to destroy the "secret constitution." It emerged from eclipse in the twentieth century, and many of the Leader's dreams for us have been fulfilled.

The author's distaste for the Constitution emerges early in the book.

Readers may long since have concluded that I am attempting to parody Professor Fletcher's précis of the New Wisdom, but of course I am incapable of such irreverence. What I have hitherto presented is exactly what our author claims. His distaste for the Constitution emerges early in the book: "The preamble to the 1787 national charter begins with the words 'We the People.' The people come together, at least as imagined by their self-appointed representatives in Philadelphia, to form 'a more perfect Union.' The emphasis is on voluntary association. We the people choose our form of government. . . . Choice marks the people. History breeds the nation. . . . The 1787 Constitution stands, therefore, for the choice of the people. The Civil War Constitution builds on a recognition of organic nationhood as the legacy of the American experience" (pp. 2–3; the context makes clear that Fletcher intends to contrast the 1787 document unfavorably with its alleged successor.)

Has not Fletcher here erected an unreal antithesis? No doubt he is correct that people in a nation feel bound

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to one another by close ties. But why does this imply anything about the form of government that a nation should establish? Why, specifically, do the close, "organic" bonds that unite a people require them to have a strongly centralized government, rather than a loose association of states? The ties that so much concern our author no doubt help to explain why the states wished to form a union, but they do not determine the nature of that union.

Fletcher might admit all this. His contention, he could reply, is not that close ties make a centralized state inevitable; it is rather that an organic state is desirable. In particular, only a powerful central authority can protect the weak by its service to the supreme political value, equality.

But what about liberty, you will no doubt object? Why think that the organic state will act to protect the weak, Fletcher's professed goal? Our author dismisses fears about liberty with a wave of the hand. "True" freedom is not freedom from government. "The postbellum constitution emphasized not freedom from government but equality under law. The state would have to do more than just leave us alone. It would have to ensure the equal protection of the laws for all" (p. 3). Rights against the central government permit the strong to oppress the weak.

Fletcher's comment does not respond at all to the objection. Even if he is right (which I do not for a moment believe) that only Leviathan can secure equal protection under law, he does not show that it will act to do so. His paragon Lincoln, after all, managed to bring about a war that resulted in more than a few deaths: was this equal protection under law? His incredible answer to this query has already been suggested, but we will shortly confront it more directly.

Why do the close, "organic" bonds that unite a people require them to have a strongly centralized government?

Before we do so, let us give Professor Fletcher a chance to present his case in its best light. He thinks equality more essential than liberty: what then is his argument for equality? With commendable honesty, Fletcher admits that most defenses of equality do not succeed: "Modern philosophical approaches toward equality all suffer from the same flaw. They are strongly committed, vaguely, to some position on the spectrum [of equality] but they offer no reason why they are so intensely committed to this value . . . equality is one of those values that has become so deeply held that it is neither questioned nor justified" (pp. 95–96).

Professor Fletcher, it transpires, believes that he has something better to offer. Equality rests on religious foundations: "the central idea that

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generates the concept of universal humanity or universal brotherhood is that we are made in the image of God" (p. 103). Exactly how the Biblical doctrine translates into political imperatives our author does not vouchsafe to tell us. I confess that I do not think very helpful Fletcher's suggestion, "[t]he basic ideas of Genesis receive their best secular rendition in the philosophy of Immanuel Kant, who takes the idea of creation in the image of God and bequeaths to us the idea of universal humanity" (p. 104).

It is just as well that our author does not develop at greater length his views on the religious basis of equality.

Fletcher, it is evident, confuses the statement of a view in magniloquent language with its philosophical defense. When he tells us, "Each generation must struggle to assay how far they are willing to go in the name of egalitarian justice" (p. 104), it becomes clear that he has nothing useful to provide to support or delimit his proposed substitute for liberty.

No doubt it is just as well that our author does not develop at greater length his views on the religious basis of equality. What he says about religion and politics in another context is positively frightening. The killing and bloodshed of the Civil War, in his view, were necessary redemptive sacrifices the people of the United States paid for the sin of slavery. "The spilling of blood in a great battle is understood instinctively as the suffering that must precede redemption. . . . But blood alone does not save a nation from its sins. The argument here is that indulgence in evil—slavery, mass killing, persecution—must first issue in the suffering of the people" (p. 19).

Here we see the author's answer to the query posed earlier. As long as the organic state endeavors to secure equality, sacrifices of liberty do not weigh in the balance. Indeed, we must seek them out as means of redemption. "The important point is that the rule of law—not charity, not prayer, not animal sacrifice—should provide the means of secular redemption. . . . The law redeems not the individual but the community or the nation as a whole" (p. 19). A skeptic might remark that under Lincoln and his Reconstruction successors, there was much pseudo-religious rhetoric, even more suffering and death, but very little redemption.

I shall forego the pleasure of comment on Professor Fletcher's *Epic of Equality*—his account of the onset, eclipse, and ultimate triumph of the Reconstruction Amendments. Rather, I shall confine myself to a brief account of this distinguished legal scholar's ideas on constitutional interpretation.

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Readers will not be surprised to learn that Fletcher thinks original intent of little importance. He rightly notes that it is often difficult to establish a clear original meaning when a number of people have drafted a document. Why bother? "Why should we care what the founders actually thought? . . . I never cease to be amazed that legal scholars . . . continue to be confused about the relevance of the framers' original intent" (pp. 30, 32).

Readers will not be surprised to learn that Fletcher thinks original intent of little importance.

One might think this view understandable, given Fletcher's less than complete enthusiasm for the Constitution. But he extends his view to the beloved Secret Constitution as well. Did the authors of the Fourteenth Amendment intend to establish integrated schools? A "vast literature has grown up around the question . . . but the dispute seems to be entirely irrelevant" (p. 31). The Supreme Court quite properly used the Fourteenth Amendment in *Brown v. Board of Education* to end segregation, since the views of the amendment's authors do not matter. Doubts about whether the amendment was legally ratified should also be put aside. Who cares? ✦

The Student and His Professor

Ludwig von Mises: The Man and His Economics

Israel M. Kirzner
ISI Books, 2001
xv + 226 pgs.

Professor Kirzner's outstanding book "aims to present, in briefest outline . . . the story of Mises in his role of economist" (p. xi, emphasis removed). In this task, it is eminently successful. But Kirzner achieves much more than this. Owing to his profound grasp of Austrian economics, he clarifies Mises's views in a number of important areas.

As everyone knows, for example, Mises regarded the German Historical School of Schmoller and Wagner with unremitting hostility. But our author raises, and then dissolves, a paradox about Mises's opposition. "What rendered the controversy between the Historical School and the Austrian School particularly fascinating, perhaps, was

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the circumstance that both schools appreciated the subjective dimension of social phenomena. It was of course Menger, who, in almost revolutionary fashion, stood classical economics on its head by insisting on the subjective character of economic phenomena and the primacy of individual choice. But the German Historical School, too, recognized that social phenomena cannot be understood apart from human motives and interests" (p. 76). Given this agreement on this fundamental issue, why was Mises so opposed to the historicists?

For Mises, subjectivism was not enough. Economics claims to discover laws that hold universally, and this the Historical School denied. "From Mises's perspective, the propensity of the German Historical School to deny the universality of the conclusions of economic theory led the school to deny the essential contributions of economics" (p. 77).

Kirzner's argument may be extended to the hermeneutical school of Austrians that many years ago generated considerable sound and fury, now somewhat abated. (I hasten to add that Kirzner bears no responsibility for where I take his argument.) The hermeneuticians, like both Mises and the Historical School, stressed the need in economics to grasp the meaning of human action. But they sought philosophical support for their stress on meaning in the convoluted prose of Hans Gadamer, and in doing so they fell into a trap.

The nature of the snare is adumbrated in the title of Gadamer's principal book, *Truth and Method*. Gadamer ardently defends the importance of meaning in understanding human action: from the Austrian perspective, so far, so good. But he contrasts meaning with scientific knowledge that endeavors to find universal rules. Hence his book's title; the truth of understanding opposes the method of the sciences. An "Austrian" economics that relies on Gadamer cannot adequately show how we can discover economic laws. It thus falls in danger of transformation into its opposite, historicism.

For Mises, opposition to the Historical School was much more than a recondite philosophical dispute. Schmoller and his colleagues not only thought universal economic laws impossible; they had a very practical reason for refusing to recognize their existence. Such laws threatened the statist policies that the group favored. If, for example, economics shows that price controls cannot achieve the goals their proponents intend, do we not have an excellent argument against instituting them? But that, for the

Mises and the Historical School stressed the need in economics to grasp the meaning of human action.

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Mises thought that interventionist measures, such as price control, would fail to achieve their goals.

"socialists of the chair" would never do. Far better to close one's eyes to the relevant economic law.

As Kirzner makes clear, Mises thought the policies of the Historical School disastrous. "Mises also traced the cataclysmic twentieth-century events for which Marxism and Nazism have been responsible to the teachings of the German Historical School. He reports that Menger had . . . foreseen that the policies pursued by the European powers would 'lead to a horrible war that will end with gruesome revolutions, with the extinction of European culture and the destruction of prosperity of all nations'" (p. 6).

Mises, Kirzner tells us, early established his reputation as a monetary theorist; and the errors and bad policies of the Historical School in financial matters naturally occupied his attention. In particular, he directed a withering polemic against the "state theory of money" devised by Georg Friedrich Knapp, a member of the Historical School. In Knapp's view, the "institution of money was essentially an invention of the state; and it is the state which determines which commodity is to serve as money" (p. 134).

This of course flew in the face of Mises's contention than money, no less than other economic phenomena, falls within the scope of economic law. Further, Knapp's theory played into the hands of supporters of inflation, who denied the connection between increases in the supply of money and rising prices.

Mises's defense of monetary theory against Knapp formed part of a larger assault on the policies of the Historical School. His principal line of attack has already been mentioned; but I have so far omitted a vital part of Mises's argument. As suggested above, Mises thought that interventionist measures, such as price control, favored by the Historical School would fail to achieve their goals. But what would happen when the interventionists grasped this failure?

The interventionists would then face a choice. They would either have to abandon their interference and return to the free market or attempt to remedy their failure through further intervention. Should they adopt the latter course, the new measures would fail in their turn, and the same choice would again arise. The continued choice of intervention would soon eventuate in full-blown socialism. According to Mises, this was precisely the course of events in Germany during World War I, when interventionist war-planning measures quickly led to total government control over the economy.

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Mises saw the influence of this pattern of socialism in surprising places. Kirzner in this connection draws attention to Mises's review of Hayek's *Constitution of Liberty*. Though he found much in the book to praise, Mises "pulled no punches in expressing disagreement with Hayek's treatment . . . of a number of features of the welfare state. 'In fact,' Mises wrote, 'the Welfare State is merely a method for transforming the market economy step by step into socialism. . . . What emerges is the system of all-round planning, that is, socialism of the type which the German Hindenburg plan was aiming at in the first World War'" (p. 181, quoting Mises).

I do not think Kirzner has fully penetrated to the essence of Hayek's position.

Economic law, then, rules out interventionism: but how are the laws relevant to it, as well as others, to be discovered? Mises had a famous and controversial answer. Economic laws are a priori true; that is to say, the laws can be known to be true just from a grasp of their meaning. Kirzner clarifies in an illuminating way Mises's position on the a priori by a comparison with Hayek's views on method.

Hayek, in Kirzner's rendition, thought that a priori economics was confined to a "pure logic of choice." The logic in question concerned equilibrium states: the learning processes needed to approach such states could only be analyzed with the help of empirical information. Mises disagreed: "Mises really did believe that the same a priori insights which permit us to understand how individuals behave in market situations permit us also to understand—at least at the most general level—those powerful tendencies toward equilibration which markets generate" (p. 85).

Kirzner seems to me right as far as he goes, but I do not think he has fully penetrated to the essence of Hayek's position. Hayek, in speaking of the pure logic of choice as consisting of "formal propositions," indicated that he accepted the views of the logical positivists and his friend Karl Popper about a priori truth. In the positivist view, all a priori truths are tautologies; they can teach us nothing new about the world. Mises dissented from this dogma, and here lies the nub of the dispute between him and Hayek.

Our author relies on a personal conversation with Mises to clarify his teacher's view on a related matter. "This writer [Kirzner] once asked Mises how a person can know that human beings other than himself are indeed purposeful. . . . Mises's answer surprised me greatly: it may perhaps soften the image of Mises as an extreme a priorist. Mises answered my

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query by saying, in effect, that we become aware of the existence of other human agents through observation" (p. 88).

Kirzner's remarks are valuable, but I am surprised at his surprise. Why would he expect Mises to think otherwise? Mises thought that economics was an a priori science: he expressed no such view about epistemology. Was Kirzner likewise surprised that Mises did not advocate an a priori ethics?

Of course Mises did not confine his discussion of economics to questions of method, and much of Kirzner's book is devoted to Mises's views on prices, entrepreneurship, and capital. Rather than summarize Kirzner's treatment of them, I propose in the space remaining to stress one topic where Kirzner strikes me as especially insightful.

In fact, his remarks on the topic in question are for me the best part of the book. Mises famously contended that time preference is always positive. People always prefer a good now to the same good in the future; in like fashion, they would rather have a good in the near future than the same good in the far future. But are there not exceptions? Critics often note that ice in winter is less valuable than ice in summer; is not a future good here preferred to a present one, if it is now winter?

Kirzner dissolves the puzzle with a brilliant insight: "For Mises, time preference refers not to dates, but to future distance from the moment of evaluation. Of course, the date at which ice is available . . . may affect its subjective evaluation. But for Mises, that kind of influence upon valuation is not what he understood by the notion of time preference. Time preference, for Mises, refers to the *sense of futurity*" (p. 159, emphasis in original). The higher value of ice in summer than in winter does not depend on the fact that it is not now summer.

Kirzner has written an indispensable work for all students of Austrian economics.

Unusually for me, I was able to find only one serious disagreement with the author; and it does not concern a central issue. He remarks that Murray Rothbard "did not subscribe to Mises' insistence on the need for (and possibility of) a sharp separation between the *wertfrei* propositions of economic science and the value-laden statements of political-philosophical discourse" (p. 217, n. 7). I do not think this an accurate account of Rothbard's position. He, like Mises, thought that economics was value-free; he differs with Mises on whether ethics is objective. But in the present book, this is a point of minor importance. Professor Kirzner has written an indispensable work for all students of Austrian economics. ✦

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